

1 LAURA VARTAIN HORN (SBN: 258485)

2 laura.vartain@kirkland.com

3 **KIRKLAND & ELLIS LLP**

4 555 California Street, 30th Floor

5 San Francisco, CA 94104

6 Telephone: (415) 439-1625

7 ALLISON M. BROWN (*Pro Hac Vice* admitted)

8 allison.brown@kirkland.com

9 JESSICA DAVIDSON (*Pro Hac Vice* admitted)

10 jessica.davidson@kirkland.com

11 **KIRKLAND & ELLIS LLP**

12 601 Lexington Avenue

13 New York, NY 10022

14 Telephone: (212) 446-4723

15 Attorneys for Uber

16 UBER TECHNOLOGIES, INC.,

17 RASIER, LLC, and RASIER-CA, LLC

18 *[Additional Counsel Listed on Following Pages]*

19 **UNITED STATES DISTRICT COURT**

20 **NORTHERN DISTRICT OF CALIFORNIA**

21 **SAN FRANCISCO DIVISION**

22 IN RE: UBER TECHNOLOGIES, INC.,
23 PASSENGER SEXUAL ASSAULT
24 LITIGATION

Case No. 3:23-md-03084-CRB

**DEFENDANTS UBER TECHNOLOGIES,
INC., RASIER, LLC, AND RASIER-CA,
LLC'S (COLLECTIVELY "UBER")
OBJECTION TO SPECIAL MASTER'S
ORDER**

25 This Document Relates to:

26 ALL ACTIONS

Judge: Hon. Charles R. Breyer

Date: February 20, 2026

Time: 10:00 a.m.

Courtroom: 6-17th Floor

NOTICE OF OBJECTION AND OBJECTION TO SPECIAL MASTER'S ORDER
TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC's (collectively, "Uber") Objection to Special Master's Order is set for hearing on February 20, 2026 at 10:00 a.m.

Pursuant to Federal Rule of Civil Procedure 53 and the Amended Order Appointing Honorable Barbara Jones (Ret.) as Master [Dkt. 2302], Uber hereby objects to the Special Master's January 9, 2026 ruling [Dkt. 4965] that Uber may not claw back 42¹ documents that Uber initially designated as privileged and subsequently produced following a re-review because Uber waived attorney-client and work-product protections. Specifically, Uber respectfully requests that the Court wholly reverse and vacate the ruling and direct the Special Master to decide whether the documents are privileged by assessing the merits of Uber's privilege and work product claims, and Plaintiffs' challenges.

This objection is based on this Notice of Objection and Objection, the attached Memorandum of Points and Authorities, the attached exhibits, and the pleadings and papers on file herein.

DATED: January 14, 2026

Respectfully submitted,

SHOOK HARDY & BACON L.L.P.

By: /s/ Maria Salcedo
Maria Salcedo

KIRKLAND & ELLIS LLP
LAURA VARTAIN HORN
ALLISON M. BROWN

O'MELVENY AND MYERS LLP
SABRINA STRONG
JONATHAN SCHNELLER

SHOOK, HARDY, & BACON, LLP
PATRICK OOT (Admitted *Pro Hac Vice*)
oot@shb.com

¹ The documents are identified in a chart in Ex. A. Uber will provide the documents to the Court at the Court's request.

1 1800 K St. NW Ste. 1000
2 Washington, DC 20006
3 Telephone: (202) 783-8400
4 Facsimile: (202) 783-4211

5 ALYCIA A. DEGEN (SBN: 211350)
6 adeggen@shb.com
7 MICHAEL B. SHORTNACY (SBN: 277035)
8 mshortnacy@shb.com
9 2121 Avenue of the Stars, Suite 1400
10 Los Angeles, CA 90067
11 Telephone: (424) 285-8330
12 Facsimile: (424) 204-9093

13 CHRISTOPHER V. COTTON (Admitted *Pro Hac*
14 *Vice*)

15 ccotton@shb.com
16 JENNIFER HILL (Admitted *Pro Hac Vice*)

17 jshill@shb.com
18 MARIA SALCEDO (Admitted *Pro Hac Vice*)
19 msalcedo@shb.com

20 **SHOOK, HARDY & BACON L.L.P.**
21 2555 Grand Blvd.
22 Kansas City, MO 64108
23 Telephone: (816) 474-6550
24 Facsimile: (816) 421-5547

25 *Attorney for Defendants*
26 UBER TECHNOLOGIES, INC.,
27 RASIER, LLC, and RASIER-CA, LLC
28

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction and Summary of Argument

The Special Master’s finding that Uber may not clawback 42 documents because Uber supposedly waived privilege and work-product protections by producing them following a re-review cannot be reconciled with the protections against waiver in Pre-trial Order No. 14 and Federal Rule of Evidence 502(d). Citing Federal Rule of Evidence 502(d), PTO 14 provides that “the production of *any* privileged or otherwise protected . . . information in this case *shall not be deemed a waiver* or impairment of any claim of privilege or protection in this case.” (emphases added). Congress enacted Rule 502(d) to authorize courts to issue orders providing broader protections from waiver than the otherwise default provision in Rule 502(b), such that disclosure of documents in litigation does not constitute waiver of privilege. This Court implemented those broader protections in PTO 14. And the Special Master’s rejection of clawback ignores those protections, and should be overruled.

The Special Master’s error traces back to April 2025, when with no pending dispute before her, no documents identified for ruling, and no briefing, Judge Cisneros ruled *sua sponte* at a status conference that Uber waived privilege and could not claw back *any* of the thousands of documents it re-reviewed, de-designated, and produced under her supervision. Uber has attempted to claw back only a small number of those documents. The Special Master followed that ruling and applied the principles of Magistrate Judge Cisneros’s ruling to 42 documents de-designated and produced after the Special Master’s appointment. Neither Judge Cisneros’s ruling nor the Special Master’s ruling provide the legal basis for the waiver conclusion for any documents, much less how that conclusion can be reconciled with PTO 14 and Rule 502(d). As explained below, Uber’s re-review and production of documents does not constitute a waiver of attorney-client or work-product protections under Rule 502(d) and PTO 14. By relying upon and applying Judge Cisneros’s blanket ruling, the Special Master swept in the procedural and due process errors of that ruling and avoided addressing the merits of the privilege claims underlying Uber’s clawback requests.

The Special Master’s ruling inflicts harsh consequences: Uber has been deprived of its attorney-client and work-product protections despite its good faith re-review of tens of thousands of documents, produced on a compressed schedule, while relying on PTO 14 and Rule 502(d)’s

1 protections against waiver by production. Uber, therefore, respectfully requests that the Court reverse
 2 and vacate the Special Master’s January 9, 2026 order, and instruct her to decide on the merits whether
 3 the documents at issue are privileged.

4 **II. Relevant Facts and Background**

5 ***Document Production and Initial Privilege Dispute:*** Uber reviewed and ultimately produced
 6 approximately 1.7 million documents at breakneck speed in 18 months. By the Fall 2024, Plaintiffs
 7 had systematically challenged thousands of entries in Uber’s privilege logs. *See, e.g.*, Dkt. 1681.

8 Magistrate Judge Cisneros was responsible for supervising privilege disputes at that time. She
 9 ruled on samples of privilege disputes in Fall 2024 and early 2025, ordering Uber to apply “lessons
 10 learned” from those rulings within a very short time (14 or 21 days) to previously produced and future
 11 privilege logs. *See* Dkts. 1785, 1808, 1908, 2005, and 2168. Uber employed a team to review its
 12 privilege logs in a good faith effort to apply the “lessons learned” to tens of thousands of privilege log
 13 entries, removing or narrowing numerous privilege claims in the process. Importantly, when producing
 14 documents to Plaintiffs, Uber consistently represented that its productions were “not intended to, and
 15 [did] not, waive any applicable privilege or other legal basis under which information may be protected
 16 from disclosure”—clearly invoking the Rule 502(d) non-waiver provision of PTO 14. *See, e.g.*, Ex. B,
 17 Jan. 10, 2025 Correspondence to Plaintiffs’ Counsel.

18 ***Judge Cisneros’s Sua Sponte Blanket Waiver Ruling:*** On April 24, 2025, during a status
 19 conference Magistrate Judge Cisneros issued a blanket ruling that Uber had “waived the right to claw
 20 back documents that it originally designated as privileged and then de-designated as part of the
 21 privilege dispute resolution process overseen by Judge Cisneros.” Dkt. 2855. The ruling issued *sua*
 22 *sponte*, with no clawback dispute pending before the Court and no documents identified for ruling.
 23 Magistrate Judge Cisneros also held that whether “that principle applies to documents de-designated
 24 after privilege issues were referred to Judge Jones² is a question for Judge Jones.” *Id.* Uber moved
 25 Judge Cisneros for leave to file a motion to reconsider her ruling. Dkt. 3442. She denied leave on
 26 procedural grounds, under Local Rule 7-9(b) governing motions for reconsideration, without
 27

28 ² The Special Master was appointed to handle privilege disputes on February 6, 2025. Dkts. 2289 and 2168.

1 addressing the merits of Uber’s waiver and due process arguments. Dkt. 3545. Uber next sought relief
2 from this Court, which denied the motion and affirmed the order denying leave. Dkt. 3649.

3 ***Judge Jones’s Application of the Blanket Waiver Ruling:*** In the clawback dispute underlying
4 this objection (the first time a court addressed an actual clawback dispute implicating waiver by
5 production), the Special Master concluded on September 3, 2025 that specific documents falling
6 within the scope of Magistrate Judge Cisneros’s ruling could not be clawed back. Ex. C, Sept. 3, 2025
7 Email Ruling. In subsequent briefing, Uber argued that the Special Master should decide the issue of
8 privilege-waiver *de novo* as to documents inadvertently de-designated after her appointment and
9 explained why Judge Cisneros’s earlier blanket ruling was incorrect. Ex. D, Sept. 10, 2025 Brief.

10 On September 30, 2025, the Special Master rejected Uber’s argument, concluding “that the
11 same principles applied by Judge Cisneros in her April 24, 2025 and July 22, 2025 orders apply to the
12 42 documents de-designated after February 6, 2025 and Uber may not claw back those documents.”
13 Ex. E, Sept. 30, 2025 Email Ruling; Dkt. 4965. On October 7, 2025, the Special Master entered an
14 order applying the September 30 ruling to 15 of the 42 documents and determined that those
15 documents were “not privileged” because they may not be clawed back.³ Ex. F, Oct. 7, 2025 Email
16 Ruling; Dkt. 4965.

17 On October 21, 2025, Uber objected to the Special Master’s September 30 and October 7
18 rulings. Ex. G, Defs.’ Oct. 21, 2025 Brief. On November 17, 2025, the Special Master denied Uber’s
19 objection via email. Ex. H, Nov. 17, 2025 Email Ruling. On January 9, 2026, the Special Master
20 entered her Nov. 17 ruling on ECF. Dkt. 4965.

21
22
23
24 ³ Those documents are: JCCP_MDL_PRIVLOG006612, JCCP_MDL_PRIVLOG006613,
25 JCCP_MDL_PRIVLOG006614, JCCP_MDL_PRIVLOG006714, JCCP_MDL_PRIVLOG006832,
26 JCCP_MDL_PRIVLOG007165, JCCP_MDL_PRIVLOG007166, JCCP_MDL_PRIVLOG007167,
27 JCCP_MDL_PRIVLOG007475, JCCP_MDL_PRIVLOG007476, JCCP_MDL_PRIVLOG007513,
28 JCCP_MDL_PRIVLOG007515, JCCP_MDL_PRIVLOG007553, JCCP_MDL_PRIVLOG007555,
and JCCP_MDL_PRIVLOG039302. The Special Master found three documents could not be clawed
back because they were substantially identical to one of the 42 documents subject to waiver
(JCCP_MDL_PRIVLOG110078, JCCP_MDL_PRIVLOG110079, and
JCCP_MDL_PRIVLOG110080).

1 III. Legal Standard

2 A district court must decide *de novo* all objections to findings of fact and conclusions of law
 3 made by a Special Master. Fed. R. Civ. P. 53(f)(3)-(4).⁴ Under the *de novo* standard of review, the
 4 court does not defer to the “lower court’s ruling but freely consider[s] the matter anew, as if no decision
 5 had been rendered below.” *U.S. v. Silverman*, 861 F.2d 571 (9th Cir. 1988). *De novo* review means
 6 the court must give Uber’s objection a “fresh look” and “independently consider all of the evidence
 7 that the special master considered.” *Sukumar v. Direct Focus, Inc.*, 349 Fed. Appx. 163, 165 (9th Cir.
 8 2009).

9 IV. Argument

10 The upshot of the Special Master’s order is that Uber’s inadvertent privilege de-designation of
 11 42 documents, effected at a rapid pace following Judge Cisneros’s sample privilege-dispute rulings,
 12 amounted to a waiver of privilege.

13 First, that conclusion is legally erroneous. It cannot be reconciled with Rule 502,
 14 operationalized by this Court through PTO 14, which together provide that disclosure of privileged
 15 documents does not constitute an automatic privilege waiver. Yet that is the exact effect of the Special
 16 Master’s rejection of Uber’s attempt to clawback inadvertently de-designated, privileged documents.
 17 This Court should sustain Uber’s objection under Rule 502(d) and PTO 14.

18 Second, the Special Master’s ruling rejecting clawback should be overruled because it was
 19 procedurally improper. Specifically, the Special Master relied upon and applied Judge Cisneros’s
 20 earlier *sua sponte* blanket ruling that Uber waived privilege over all de-designated documents, thereby
 21 replicating Judge Cisneros’s earlier procedural errors. Judge Cisneros rejected privilege categorically
 22 over all de-designated documents, without any privilege dispute pending before her and thereby
 23 deprived Uber of any opportunity to be heard.

24
 25 ⁴ The order appointing the Special Master states that pursuant to “Rule 53(f)(3)-(5), the Court shall
 26 review findings of fact made or recommended by the Master for clear error.” Dkt. 2302. Rule 53 (f)
 27 (3), however, provides that a court “must decide *de novo* all objections to findings of fact made or
 28 recommended by a master” unless the parties with the court’s approval stipulate that the findings will
 be reviewed for clear error. Here the parties did not stipulate that findings of fact would be reviewed
 by clear error. The *de novo* standard of review provided in Rule 53(f)(3) therefore applies to both
 findings of fact and conclusions of law.

A. The Special Master Substantively Erred in Finding That Uber May Not Claw Back Documents Because It Waived Privilege by Producing the Documents After a Re-Review.

i. Rule 502 Exists to Protect Against Waiver of Privilege.

Rule 502(d) enables federal courts to issue orders protecting parties from waiver of privilege or protection by merely producing documents in discovery—the exact circumstances underlying the Special Master’s erroneous rejection of clawback here.

Rule 502(d) provides: “A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.”

Under the traditional, common-law rule, a party waives attorney-client privilege when it voluntarily discloses privileged information to a third party, including an adversary in litigation. By enacting Rule 502 in 2008, Congress substantially departed from the traditional rule by imposing limitations on the waiver by disclosure of the attorney-client privilege or work product protection in federal proceedings. Fed. R. Evid. 502, Advisory Committee Notes, Sept. 26, 2007 Committee Letter to Congress.⁵ In his statement supporting the proposed legislation, co-sponsor Senator Specter remarked:

Current law on attorney-client privilege and work product is responsible in large part for the rising costs of discovery—especially electronic discovery. Right now, it is far too easy to inadvertently lose or “waive” the privilege. A single inadvertently disclosed document can result in waiving the privilege not only as to what was produced, but as to all documents on the same subject matter. In some courts, a waiver may be found even if the producing party took reasonable steps to avoid disclosure. Such waiver will not just affect the case in which the accidental disclosure is made, but will also impact other cases filed subsequently in State or Federal courts.

S. Rep. No. 110-264, at 2 (2008).

Two key congressional purposes for enacting Rule 502 were: (1) mitigate the otherwise harsh consequence of waiver for mistaken disclosures, and (2) enhance predictability of the consequences

⁵ See Pub. L. 110-322, § 1(a), Sept. 19, 2008. Unlike all other federal rules of procedure, rules governing evidentiary privilege must be approved by an affirmative act of Congress. See 28 U.S.C. § 2074 (b).

1 of disclosure of privilege information by creating the first uniform national rule on waiver-by-
2 disclosure. *Id.* at 3; Fed. R. Evid. 502, Statement of Congressional Intent Regarding Rule 502.

3 Congress included two key provisions to accomplish those goals. First, Rule 502(b) sets a
4 “default” procedure that only allows a party to claw back certain inadvertent disclosures. Specifically,
5 Rule 502(b) provides that disclosure does not operate as a waiver only if the disclosure was
6 inadvertent, occurred despite reasonable steps, and reasonable steps were taken to promptly rectify.
7 Second, Rule 502(d) allows courts to “order that the privilege or protection *is not waived* by disclosure
8 connected with the litigation pending before the court—in which event the disclosure is also not a
9 waiver in any other federal or state proceeding.” (emphasis added). In other words, Rule 502(d) orders
10 allow courts to “supplant[] the default procedures set forth in Rule 502(b).” *Great-West Life & Annuity*
11 *Ins. Co. v. American Economy Ins. Co.*, 2013 WL 5332410, at *11 (D. Nev. Sept. 23, 2013). Such
12 “court order[s] may provide for return of documents without waiver *irrespective of the care taken by*
13 *the disclosing party.*” Fed. R. Evid. 502, Advisory Committee’s Note to subdivision (d) (emphasis
14 added); *see also id.*, Statement of Congressional Intent Regarding Rule 502, Subdivision (d) - Court
15 Orders (Rule 502(d) “is designed to enable a court to enter an order . . . that will allow the parties to
16 conduct and respond to discovery expeditiously, without the need for exhaustive pre-production
17 privilege reviews, *while still preserving each party’s right to assert the privilege* to preclude use in
18 litigation of information disclosed in such discovery.”) (emphasis added).

19 In this case, the Court operationalized the protections Rule 502(d) contemplates through PTO
20 14, as explained below.

21 **ii. Production Does Not Result in Waiver of Privilege Under PTO No. 14.**

22 Acting on its Rule 502(d) authority, this Court issued PTO 14 to ensure that mere production
23 of privileged documents does not amount to automatic waiver.

24 Merely producing documents does not constitute waiver of privilege under Stipulated Pretrial
25 Order 14, which provides:

26 Pursuant to Federal Rule of Evidence 502(d), the production of *any*
27 privileged or otherwise protected or exempted information in this case *shall*
28 *not be deemed a waiver* or impairment of *any claim of privilege or*
protection in this case or in any other federal or state proceeding, including,

but not limited to, the attorney-client privilege, the protection afforded to work production materials, statutory privileges and protections, or the subject matter thereof, as to the produced documents and any related materials.

PTO 14 at 2 (emphases added). And for clawback disputes specifically, PTO 14 further prohibits the party challenging the privilege from relying on “the fact or circumstances of disclosure” (PTO 14 ¶ 6), requiring instead that the clawback-opponent argue the *merits* of the privilege claim.

The non-waiver language of PTO 14 applies categorically to *all* document productions in this litigation: it does not even require inadvertence, *cf.* Fed. R. Evid. 502(b), or otherwise impose any limitations concerning how or during what stage of discovery the production occurred.

Further, PTO 14 provides a claw-back procedure for documents that have “been produced for which the Producing Party asserts privilege and/or other protection,” regardless of whether such production was inadvertent. *Id.* at ¶ 4. The majority of courts interpret Rule 502(d) orders “allow[] a party to claw back privileged materials ***without regard to whether the disclosure was inadvertent.***” *GXO Logistics Supply Chain, Inc. v. Young Living Essential Oils, LC*, 2024 WL 4960008, at *4 (N.D. Miss. Dec. 3, 2024) (emphasis added); *Thomas v. Marshall Public School*, 690 F. Supp. 3d 941, 962 (D. Minn. 2023) (stating “Rule 502(d) allows a party who discloses privileged material to claw them back without having to prove the disclosure was ‘inadvertent’”); *United States v. Hall*, No. 2020 WL 7027473, at *3 (N.D. Tex. Nov. 30, 2020) (finding Rule 502(d) applicable to privileged materials disclosed “inadvertently or purposefully”); *United States v. Caroleo*, 2019 WL 5869690, at *1 (E.D.N.Y. Nov. 11, 2019) (“Even if the disclosure is not ‘inadvertent’ under Rule 502(b), however, a court may nevertheless ‘order that [the] privilege or protection is not waived by disclosure connected with the litigation’” (quoting Fed. R. Evid. 502(d))); *Brookfield Asset Management, Inc. v. AIG Financial Products Corp.*, 2013 WL 142503, at *1 (S.D.N.Y. Jan. 7, 2013) (holding that under stipulated Rule 502(d) order that no waiver of any applicable privilege would result from the defendant’s production “of any documents in this proceeding,” the defendant had a right to claw back privileged documents “no matter what the circumstances giving rise to their production were”).⁶

⁶ See also, e.g., *Everest Nat’l Ins. Co. v. Am. Claims Mgmt., Inc.*, 2025 WL 2381475, at *5 (D.N.J. Aug. 15, 2025); *United States v. Hatfield*, 2010 WL 11515679, at *1 (E.D.N.Y. July 13, 2010);

1 That majority interpretation—permitting clawback categorically, without even requiring
 2 inadvertence—correctly applies Rule 502(d), which (unlike 502(b)) does not contain an inadvertence
 3 requirement. And it is consistent with the intent of the rule’s drafters. Indeed, in the attached
 4 declaration, Professor Daniel Capra, the co-author of the text of Rule 502, author of the Committee
 5 Note to that Rule, and Reporter to the Judicial Conference Advisory Committee on Evidence Rules
 6 since 1996, confirms that:

7 The Advisory Committee viewed Rule 502(d) as the most important
 8 provision in the rule [because] it provides parties a predictable protection
 9 that can be relied upon . . . That is why the Committee was of the view that
 10 a Rule 502(d) order could protect against waiver *even when disclosures are*
 11 *intentional*. The Advisory Committee clearly intended that Rule 502 (d)
 12 orders could cover intentional disclosures as well as mistaken ones. . . .
 Under Rule 502(d), protective orders—like the one in this case—are only
 effective when they approve procedures that would not pass muster if
 analyzed exclusively under Rule 502(b).

13 Ex. I at ¶¶ 4-5, 7 (emphasis added).

14 **iii. Purported Concerns About Serial Designation, De-designation, and**
 15 **Clawback Creating Delay and Inefficiency Do Not Justify Ignoring Rule**
 16 **502(d).**

17 While neither Magistrate Judge Cisneros nor the Special Master have provided the legal basis
 18 for the conclusion that Uber waived privilege despite the Rule 502 (d) order in this case, Judge
 19 Cisneros has noted “the clawback protocol on which Uber relies in Pretrial Order No. 14 did not
 20 contemplate Uber serially designating, de-designating, and re-designating documents as privileged in
 21 a manner that undermines the completion of discovery on any reasonable schedule.” Dkt. 3545 at 8;
 22 *see also* Ex. J, April 24, 2025 Hr’g Tr. at 15:9-19 (Judge Cisneros stating that allowing clawbacks of
 23 de-designated documents would be “inefficient” and amount to “redoing” the “prior corpus of . . .
 24 documents that we worked through over the fall.”). Those concerns about supposed delay and
 25 inefficiency are not only misguided, but also cannot justify ignoring the plain text and purposes of

26 *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*, 2009 WL 464989, at *4 (N.D. Tex.
 27 Feb. 23, 2009). As explained in more detail below, a minority of courts require a showing of
 28 *inadvertence* before permitting clawback under Rule 502(d). That minority view incorrectly applies
 the rule, but Uber would be entitled to clawback even under that reading, as its production was
 inadvertent. *See infra* at 9-12.

1 Rule 502(d) and PTO 14, which permit Uber to clawback privileged documents in these exact
2 circumstances regardless of inadvertence.

3 Courts' inherent authority "to manage their own affairs" must yield "to any express grant of or
4 limitation on the district court's power contained in a rule," like Rule 502(d). *Dietz v. Bouldin*, 579
5 U.S. 40, 45 (2016). As explained above, PTO 14 plainly provides, as Rule 502(d) permits, that
6 production of a document is not a waiver of privilege. Dkt. 396 ¶ 2. Neither Magistrate Judge Cisneros
7 nor the Special Master have identified anything other than the review and production of documents
8 that could constitute a waiver. But to treat mere review and production of documents as waiver would
9 require ignoring PTO 14 and Rule 502(d), which prohibit treating mere production as waiver and
10 provide a procedure to clawback privileged documents post-production. That result is impermissible,
11 as PTO 14 "entitled [Uber] to rely on Rule 502(d) for the documents already produced" to permit
12 clawback. *See, e.g., Arconic Inc. v. Novelis Inc.*, 2019 WL 911417, at *2 (W.D. Pa. Feb. 26, 2019).⁷

13 A minority of courts apply an inadvertence requirement to 502(d) orders—notwithstanding its
14 lack of textual support—for policy reasons, fearing that parties will otherwise "intentionally and
15 tactically disclose protected materials during litigation, while preserving the ability to assert privilege
16 when such tactics change." *E.g., Smith v. Best Buy Stores, L.P.*, 2017 WL 3484158, at *4 (D. Idaho
17 Aug. 14, 2017) (dicta).⁸

20 ⁷ Finding waiver in violation of the 502(d) order in PTO 14 violates due process and basic notions of
21 fairness because it would effectively amend that order and apply the amendment retroactively, despite
22 Uber's reliance on the non-waiver protections of the order. *Cf. Landgraf v. USI Film Prods.*, 511 U.S.
23 244, 265 (1994); *Reyes v. Garland*, 11 F.4th 985 (9th Cir. 2021); *Blum v. Merrill Lynch Pierce Fenner*
& Smith Inc., 712 F.3d 1349, 1355 (9th Cir. 2013); *United States v. Potts*, 528 F.2d 883, 886 (9th Cir.
1975); *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 229 (2d Cir. 2001).

24 ⁸ Many such cases are inapposite because they reject an argument much broader than the one Uber
25 makes here, that no waiver is possible *by any means* when a 502(d) order is in place, even waiver by
26 means other than mere disclosure and production. *See, e.g. Certain Underwriters at Lloyd's, London*
27 *v. Nat'l R.R. Passenger Corp.*, 218 F. Supp. 3d 197, 202 (E.D.N.Y. 2016); *Smith*, 2017 WL 3484158,
28 at *4. For example, notwithstanding a 502(d) order, a party's "offensive introduction of [its own]
privileged communication" in litigation "will likely constitute waiver, under the well-established
doctrine that attorney-client privilege may not be used both as a sword and shield." *Epic Games, Inc.*
v. Apple Inc., 781 F. Supp. 3d 943, 996 (N.D. Cal. 2025). Here Uber has not used the documents for
any purpose and there is no basis for finding waiver other than Uber's review and production.

Those policy concerns not only must yield to the plain text of Rule 502(d), but they also have no application here. There is no evidence that Uber clawed back documents to engage in any type of gamesmanship or because it was acting “tactically” to gain an advantage in litigation, such as using the documents in support of a motion. *Smith*, 2017 WL 3484158, at *4. Instead, the goal of Uber’s re-review was to ensure its privilege assertions better adhere to Judge Cisneros’s sample rulings. But inevitably, that re-review was imperfect: some privileged documents were incorrectly de-designated. As a result, Uber has clawed back a small number of those documents—42 documents at issue representing 0.0024% of the 1.7 million produced—upon discovering the privileged productions.

Judge Cisneros’s concerns about efficiency and delay from following PTO 14’s clawback procedure are likewise misguided and inapplicable here. Indeed, there is *zero evidence* in the record of how the relevant clawbacks have meaningfully delayed the case schedule. The Court’s procedures sufficiently guard against any delay, given that any clawback notices must be made within 21 days of discovery and can be challenged by Plaintiffs under Special Master Order No. 4 (Dkt. 2933). If Plaintiffs do not challenge the clawback, that ends the matter—no inefficiency or delay will materialize. The Special Master procedures have allowed any challenge to be resolved quickly. But for the blanket waiver ruling, the clawbacks at issue could have been resolved on the merits months ago.

iv. Uber’s Disclosures Were Inadvertent.

Even if the minority view were correct that the inadvertence requirement must be met to avoid waiver by production under Rule 502(d) orders, Uber would still be entitled to clawback. Uber’s production of later-clawed back documents was inadvertent, regardless of the fact that attorneys had reviewed the documents prior to de-designation.

“An ‘inadvertent disclosure’ is simply where the work-product protected [or privileged] document was produced as the result of a mistake.” *B&G Foods North America, Inc. v. Embry*, 2024 WL 922900, at *2 (E.D. Cal. March 4, 2024). “[A] document may be produced inadvertently even after review and redaction.” *In re Zetia (Ezetimibe) Antitrust Litig.*, 2019 WL 6122012, at *7 (E.D. Va. July 16, 2019) (collecting cases); *Guidiville Rancheria of California v. United States*, 2013 WL 6571945, at *4 (N.D. Cal. Dec. 13, 2013). This is because “the ‘inadvertence’ requirement of Rule 502(b) was not designed to turn on fine distinctions based on the nature of the mistake to determine

whether the particular type of mistaken disclosure qualifie[s] for protection from waiver.” *Datel Holdings Ltd. v. Microsoft Corp.*, 2011 WL 866993, at *3 (N.D. Cal. March 11, 2011); *see also United States v. United Health Grp., Inc.*, 2020 WL 10731257, at *3 (C.D. Cal. Nov. 9, 2020). Therefore, an intentional production of documents qualifies as inadvertent disclosure if it is the result of a mistake. *Datel*, 2011 WL 866993, at *3. This comports with the purpose of Rule 502(b). “[T]he point of Rule 502(b) is to protect clients’ confidences from their lawyers’ human errors.” *Carmody v. Bd. of Trs. of Univ. of Ill.*, 893 F.3d 397, 406 (7th Cir. 2018). As one court explained:

[T]o find that a document disclosed by a lawyer is never inadvertent would vitiate the entire point of Rule 502(b). Concluding that a lawyer’s mistake never qualifies as inadvertent disclosure under Rule 502(b) would gut that rule like a fish. It would essentially reinstate the strict waiver rule in cases where lawyers reviewed documents, and it would create a perverse incentive not to have attorneys review documents for privilege.

Amobi v. District of Columbia Dept. of Corrections, 262 F.R.D. 45, 54 (D.D.C. 2009); *see also Hatfield v. Bonneville Cnty.*, 2025 WL 358441, at *6 (D. Idaho Jan. 31, 2025).

These cases are consistent with the intent of the rule’s drafters, who “by that term, intended to cover any disclosure that was mistaken. The term ‘inadvertent’ was taken from prior case law That case law covered all disclosures that the producing party claimed to be a mistake.” Ex. I, ¶ 11 (Prof. Capra Decl.).

While nothing more than a mistake is required to establish inadvertence, courts also take account of the realities of large-scale discovery when determining whether a disclosure was inadvertent.⁹ *Pac. Coast Steel v. Leany*, 2011 WL 4704217, at *5 (D. Nev. Oct. 4, 2011) (“The scope

⁹ Some courts have distinguished between two approaches to the inadvertence analysis under Rule 502(b)(1), the first approach considering “if the party intended to produce a privileged document or if the production was a mistake,” and the second approach conducting a “totality of the circumstances” analysis that, in effect, determines whether the disclosure was both inadvertent *and* reasonable based on factors like the precautions taken to prevent the inadvertent disclosure and efforts to rectify it. *Amobi*, 262 F.R.D. at 53; *see also T&W Holding Co., LLC v. City of Kemah, Texas*, 641 F. Supp. 3d 378, 382 (S.D. Tex. 2022); *Pac. Coast Steel v. Leany*, 2011 WL 4704217, at *4 (D. Nev. Oct. 4, 2011) (totality of the circumstances approach). Most courts have rejected the second approach, noting that this analysis conflates the 502(b)(2) and (3) factors (“reasonable steps to prevent” and “reasonable steps to rectify” the inadvertent disclosure) with the 502(b)(1) inadvertence factor, and that the first, simpler approach is more consistent with the language of the rule. *E.g., Amobi*, 262 F.R.D. at 53-54. However, courts using the simpler “mistake” inadvertence standard can still consider the

1 of the discovery . . . in this case also weighs in favor of finding the documents were inadvertently
 2 disclosed. Plaintiffs produced more than 2.3 million pages of documents.”). “Such errors are, of
 3 course, inevitable in complex litigation involving the production of tens of thousands of documents.”
 4 *BNP Paribas Mortg. Corp. v. Bank of America N.A.*, 2013 WL 2322678 at *8 (S.D.N.Y. May 21,
 5 2013). As such, “[c]ourts have routinely found that where a large number of documents are involved,
 6 there is more likely to be an inadvertent disclosure rather than a knowing waiver.” *Baker’s Aid, a Div.*
 7 *of M. Raubvogel Co. v. Hussmann Foodservice Co.*, 1988 WL 138254, at *5 (E.D.N.Y. Dec. 19, 1988);
 8 *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 388 (7th Cir. 2008).

9 Indeed, under similar circumstances, Judge Hixson of this District found that Apple
 10 inadvertently disclosed and was entitled to clawback two documents it de-designated following a re-
 11 view because:

12 Epic cites no authority for the proposition that inadvertence does not include an
 13 intentional but mistaken decision by a human document reviewer. The question,
 14 after all, is whether Apple deliberately produced a document, not whether one
 15 particular document reviewer deliberately decided these documents should have
 16 been redacted rather than withheld in full. Apple used a large team of reviewers to
 17 make privilege calls on large numbers of documents, and a mistake does not mean
 18 that the company deliberately produced the document.

19 *Epic Games, Inc. v. Apple, Inc.*, Case No. 20-cv-05640-YGR (TSH), 2025 U.S. Dist. LEXIS 34007
 20 (N.D. Cal. Feb. 25, 2025).

21 Here too, certain documents were produced by reviewing attorneys who did not appreciate the
 22 privileged nature during review or who simply made a mistake in applying redactions or coding a
 23 document—a common occurrence in any large-scale, time-pressured document production as illustrated
 24 by the above authority. Uber did not intend to produce privileged documents and waive its privilege.
 25 In fact, the content of the documents at issue confirms that privileged content was inadvertently
 26 produced. For example, JCCP_MDL_PRIVLOG007423 and JCCP_MDL_PRIVLOG006832 are
 27 email threads that were produced in full on March 8, 2025. While the last emails in each thread are

28 _____
 circumstances and context of a disclosure, such as the large scope and timing of discovery, to
 determine whether a disclosure of privileged documents was, in fact, a mistake. *See, e.g., Patagonia,*
Inc. v. Anheuser Busch, LLC, 2020 WL 12048989, at *1 (C.D. Cal. Sept. 29, 2020) (finding disclosure
 of narrowly redacted documents was inadvertent in “a major case with massive document discovery
 and production, posing a major challenge to review of documents for privilege”).

1 between non-lawyers only, the thread includes earlier emails to and from Aaron Brand, then-Legal
 2 Director, Mobility Product Counsel Team. These documents were clawed back and reproduced on
 3 May 16 and June 16 to apply redactions to the legal advice requested from and provided by Mr. Brand.
 4 Plaintiffs have never disputed the privileged nature of the redacted communications to and from Mr.
 5 Brand.

6 Another example is JCCP_MDL_PRIVLOG057200, an email thread that was produced in full
 7 on March 8, 2025. Shortly thereafter, it was discovered that the document was produced and
 8 mistakenly did not contain the necessary redactions. It was clawed back and reproduced with
 9 redactions on April 18, 2025. Limited redactions have been applied to messages to and from Scott
 10 Binnings, Uber's Associate General Counsel.

11 As a result of the Special Master's erroneous ruling denying clawback, Uber is unfairly
 12 deprived of its bedrock right to attorney-client privilege and work-product protection even though
 13 Plaintiffs have not challenged the underlying merits of Uber's clawback.

14
 15 **B. The Special Master's Finding of Waiver Was Erroneous Because It Followed**
 16 **and Applied Magistrate Judge Cisneros's Procedurally Improper *Sua Sponte*,**
 17 **Blanket Ruling on Waiver by Disclosure.**

18 The Special Master's ruling rested on the finding "that the same principles applied by Judge
 19 Cisneros in her April 24, 2025 and July 22, 2025 orders apply to the 42 documents de-designated after
 20 February 6, 2025 and Uber may not claw back those documents." Dkt. 4965; Ex. E. By relying upon
 21 and applying Magistrate Judge Cisneros's *sua sponte* blanket ruling, the Special Master's ruling
 22 sweeps in the procedural and due process errors of that blanket ruling.

23 First, the issue was not properly before Magistrate Judge Cisneros as the blanket privilege
 24 ruling was made with no pending clawback challenge dispute before her. PTO 14 governs clawback
 25 disputes in this litigation and provides specific procedural mechanisms for resolving them. *Northwest*
 26 *Acceptance Corp. v. Lynwood Equipment, Inc.*, 841 F.2d 918, 924 (9th Cir. 1988) ("A pretrial order .
 27 . . controls the subsequent course of action in the litigation."). PTO 14 prescribes a procedure for a
 28 producing party to notify the receiving party that it produced a document for which it asserts privilege.
 The receiving party then can contest the assertion of privilege by providing a written "Notice of

1 Clawback Challenge.” The parties then go through a conferral period. If the conferral does not resolve
 2 the dispute, the parties are required to submit the issue to the Court by filing a “joint letter brief.” Dkt.
 3 396 ¶¶ 4-6.

4 None of that happened here. The general topic of clawbacks *procedures* was mentioned by
 5 Plaintiffs in a Joint Status Report, along with many other discovery topics. Plaintiffs made no
 6 substantive challenge to documents Uber had clawed back. Joint Status Report (Dkt. 2823) at 2-3.
 7 Plaintiffs never mentioned waiver—neither in the Joint Status Report nor at the Status Conference.
 8 Nevertheless, the Court found Uber’s de-designation decisions constituted a waiver of its attorney-
 9 client or work-product privilege before Uber was given an opportunity to argue against waiver. Ex. J,
 10 April 24, 2025 Hr’g Tr. at 9:18–19. This is directly contrary to PTO 14’s clawback dispute resolution
 11 procedures.

12 Second, and relatedly, the blanket ruling was improper because it was made *sua sponte* without
 13 an opportunity for Uber to be heard on an important issue with wide implication. To allow litigants
 14 the full and fair opportunity to be heard, courts generally disfavor *sua sponte* review. *See, e.g., Lewis*
 15 *v. Woodford*, 2007 WL 196635, at *20 n.12 (E.D. Cal. Jan. 23, 2007). “There are, however, several
 16 respects in which the Federal Rules allow the district court, *with appropriate notice*, to raise issues
 17 *sua sponte*.” *Jones v. L.A. Central Plaza LLC*, 74 F.4th 1053, 1057 (9th Cir. 2023) (emphasis added).
 18 Further, “[a] court *may only* grant a motion *sua sponte* if all parties have a full opportunity to address
 19 the issue.” *Mead Reinsurance v. Granite State Ins. Co.*, 873 F.2d 1185, 1189 (9th Cir. 1988) (emphasis
 20 added); *see also Heinz v. C.I.R.*, 770 F.2d 874, 876 (9th Cir. 1985).

21 The due process problems with a *sua sponte* ruling are only heightened when a court
 22 determines whether a party has waived attorney-client privilege. “[T]he **attorney-client privilege is,**
 23 **perhaps, the most sacred of all legally recognized privileges**, and its preservation is essential to the
 24 just and orderly operation of our legal system.” *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir.
 25 1997) (emphasis added). Indeed, “[t]he privilege recognizes that sound legal advice or advocacy
 26 serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed
 27 by the client.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Thus, “[w]hether express or
 28 implied, the scope of a waiver must be *narrowly construed* and ‘fit within the confines of the waiver.’”

1 *Garcia v. Progressive Choice Ins. Co.*, 2012 WL 3113172, at *3 (S.D. Cal. July 30, 2012) (emphasis
2 added).

3 By rejecting Uber’s clawbacks *sua sponte*, without an opportunity to be heard, Judge
4 Cisneros’s order violated Uber’s due process right to notice and an opportunity to be heard on the
5 matter.¹⁰ Uber neither had notice that waiver would be raised at the Status Conference before Judge
6 Cisneros nor a fair opportunity to address the issue. In short, Uber did not have the “full opportunity
7 to address the issue” necessary for the Court to raise and rule on waiver of the attorney-client and
8 attorney work-product protections *sua sponte*.¹¹ And while the Special Master allowed Uber the
9 opportunity to be heard, she rested her decision on the blanket ruling that violates due process,
10 effectively replicating Judge Cisneros’s earlier procedural errors.

11 **V. Conclusion**

12 The Special Master’s order and its reliance on Magistrate Judge Cisneros’s orders denied Uber
13 of substantive rights afforded under PTO 14’s non-waiver provision. Uber respectfully requests that
14 the Court vacate the Special Master’s January 9, 2026 order and direct her to decide Uber’s clawback
15 privilege claims on the merits.

16
17
18 ¹⁰ Those errors were magnified by the fact that Judge Cisneros opted to resolve Uber’s privilege
19 dispute through a categorical, blanket ruling, rather than on a document-by-document basis. As a
20 mixed question of fact and law, “waiver of the attorney-client privilege favors a case-by-case
21 determination of waiver based on a consideration of all the circumstances.” *Eureka Financial Corp.*
22 *v. Hartford Acc. and Indem. Co.*, 136 F.R.D. 179, 184 (E.D. Cal. 1991); *see also United States v.*
23 *Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020) (mixed question); *Hernandez v. Tanninen*, 604
24 F.3d 1095, 1101 (9th Cir. 2010). The Magistrate Judge did not consider the specific factual
25 circumstances concerning Uber’s de-designations or clawback of certain documents. Nor did Uber have
26 the opportunity to develop, brief, or present its legal arguments that its de-designations do not
27 constitute waiver before the Magistrate Judge made the blanket ruling.

28 ¹¹ Even assuming that the parties’ mention of clawback procedures in the Status Report was sufficient
to allow Magistrate Judge Cisneros to rule on waiver *sua sponte* without violating due process (and it
was not), the ruling would still be improper because Plaintiffs themselves forfeited the potential
privilege-waiver argument by not asserting it. *See Redd v. Guerrero*, 84 F.4th 874, 892 (9th Cir. 2023)
 (“[T]his court will not address waiver if not raised by the opposing party.” (quoting *United States v.*
Doe, 53 F.3d 1081, 1082 (9th Cir. 1995))); *United States v. Garcia-Lopez*, 309 F.3d 1121, 1123 (9th
Cir. 2002) (noting that a party “can ‘waive waiver’ implicitly by failing to assert it”); *cf. United States*
v. Sainz, 933 F.3d 1080 (9th Cir. 2019) (reversing based on district court raising *sua sponte* defendant’s
waiver of right to seek sentence reduction).

1 DATED: January 14, 2026

Respectfully submitted,

2 **SHOOK HARDY & BACON L.L.P.**

3 By: /s/ Maria Salcedo

4 Maria Salcedo

5 **KIRKLAND & ELLIS LLP**

6 LAURA VARTAIN HORN

7 ALLISON M. BROWN

8 **O'MELVENY AND MYERS LLP**

9 SABRINA STRONG

JONATHAN SCHNELLER

10 **SHOOK, HARDY, & BACON, LLP**

PATRICK OOT (Admitted *Pro Hac Vice*)

11 oot@shb.com

12 1800 K St. NW Ste. 1000

Washington, DC 20006

13 Telephone: (202) 783-8400

Facsimile: (202) 783-4211

14 ALYCIA A. DEGEN (SBN: 211350)

15 adegen@shb.com

MICHAEL B. SHORTNACY (SBN: 277035)

16 mshortnacy@shb.com

17 2121 Avenue of the Stars, Suite 1400

Los Angeles, CA 90067

18 Telephone: (424) 285-8330

Facsimile: (424) 204-9093

19 CHRISTOPHER V. COTTON (Admitted *Pro Hac*
20 *Vice*)

21 ccotton@shb.com

JENNIFER HILL (Admitted *Pro Hac Vice*)

22 jshill@shb.com

MARIA SALCEDO (Admitted *Pro Hac Vice*)

23 msalcedo@shb.com

24 **SHOOK, HARDY & BACON L.L.P.**

25 2555 Grand Blvd.

Kansas City, MO 64108

26 Telephone: (816) 474-6550

Facsimile: (816) 421-5547

27 *Attorney for Defendants*

28 UBER TECHNOLOGIES, INC.,

RASIER, LLC, and RASIER-CA, LLC

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EXHIBIT A

<u>Privilege Log Number</u>
JCCP_MDL_PRIVLOG006153
JCCP_MDL_PRIVLOG058772
JCCP_MDL_PRIVLOG005511
JCCP_MDL_PRIVLOG007033
JCCP_MDL_PRIVLOG059502
JCCP_MDL_PRIVLOG024087
JCCP_MDL_PRIVLOG009470
JCCP_MDL_PRIVLOG006133
JCCP_MDL_PRIVLOG016154
JCCP_MDL_PRIVLOG016161
JCCP_MDL_PRIVLOG016164
JCCP_MDL_PRIVLOG017899
JCCP_MDL_PRIVLOG017900
JCCP_MDL_PRIVLOG005512
JCCP_MDL_PRIVLOG059680
JCCP_MDL_PRIVLOG059681
JCCP_MDL_PRIVLOG059682
JCCP_MDL_PRIVLOG059683
JCCP_MDL_PRIVLOG059684
JCCP_MDL_PRIVLOG059685
JCCP_MDL_PRIVLOG023201
JCCP_MDL_PRIVLOG043587

1	JCCP_MDL_PRIVLOG007423
2	JCCP_MDL_PRIVLOG057200
3	JCCP_MDL_PRIVLOG057551
4	JCCP_MDL_PRIVLOG057552
5	JCCP_MDL_PRIVLOG006612
6	JCCP_MDL_PRIVLOG006613
7	JCCP_MDL_PRIVLOG006614
8	JCCP_MDL_PRIVLOG006832
9	JCCP_MDL_PRIVLOG006714
10	JCCP_MDL_PRIVLOG007165
11	JCCP_MDL_PRIVLOG007166
12	JCCP_MDL_PRIVLOG007167
13	JCCP_MDL_PRIVLOG007475
14	JCCP_MDL_PRIVLOG007476
15	JCCP_MDL_PRIVLOG007553
16	JCCP_MDL_PRIVLOG007555
17	JCCP_MDL_PRIVLOG039302
18	JCCP_MDL_PRIVLOG007513
19	JCCP_MDL_PRIVLOG007515
20	JCCP_MDL_PRIVLOG014929
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